

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re

Case No. 589-04925-MM

PRIAM CORPORATION, a Delaware  
corporation,

Debtor.

**MEMORANDUM OPINION**

**INTRODUCTION**

Before the court is the motion of Expeditors International of Washington, Inc. ("Expeditors") for reconsideration of the court's order of June 30, 1993 denying Expeditors' Motion for Attorneys' Fees Pursuant to 11 U.S.C. § 506(b). By oral ruling on June 23, 1993, the court denied Expeditors' motion for attorneys' fees on the basis that Expeditors did not have a consensual security agreement providing for payment of attorneys' fees, as contemplated by § 506(b). For the reasons that follow, Expeditors' Motion for Reconsideration of Motion for Attorneys' Fees is denied.

**FACTS**

Expeditors provided air freight services to the debtor, PRM Debtor Corporation, f/k/a Priam Corporation ("PRM"), pre-petition since 1986. As of the petition date, Expeditors had a claim against the debtor for approximately \$72,000 and had possession of the debtor's goods valued at \$491,061.09. The goods were turned over to the debtor post-petition by stipulation of the parties.

1 Expeditors would take possession of the debtor's goods for the purpose of delivery from PRM's  
2 foreign subsidiary to its domestic office. It provided bills of lading to PRM and sent post-delivery  
3 invoices to PRM. Paragraph 15 of Expeditors' standard invoice provided for a general lien on  
4 delivered goods to secure the shipping charges. The provision includes the right to recover expenses  
5 of collection or litigation, including a reasonable attorneys' fee. Expeditors' standard invoice provides  
6 that it is governed and construed under Washington law. Expeditors has sent the debtor 1485 such  
7 invoices.

8 Expeditors filed a proof of secured claim in the debtor's bankruptcy. PRM objected to the  
9 claim, and a hearing was scheduled on the debtor's objection to Expeditor's claim. PRM withdrew its  
10 claim and paid Expeditors the principal amount of its claim, reserving for later determination  
11 Expeditors' entitlement to interest and attorneys' fees. PRM has since paid to Expeditors an  
12 additional \$29,989.27 for interest. To date, Expeditors has incurred \$59,538.64 in attorneys' fees.

### 14 DISCUSSION

15 11 U.S.C. § 506(b) provides in pertinent part:

16 To the extent that an allowed secured claim is secured by property the value of  
17 which . . . is greater than the amount of such claim, there shall be allowed to the  
18 holder of such claim, interest on such claim, and any reasonable fees, costs, or  
19 charges provided for under the agreement under which the claim arose.

20 Where a statute is clear on its face, courts must construe it to give the words of the statute their  
21 plain meaning. U.S. v. Ron Pair Enterprises, Inc., 109 S. Ct. 1026, 1030-31 (1989)(construing §  
22 506(b)'s applicability to interest on tax liens). Recovery of postpetition interest under the statute  
23 is unqualified. Id. at 1030. However, recovery of other charges is qualified under the statute. Id.  
24 To be entitled to attorneys' fees under § 506(b), (1) the fees must be provided for in the  
25 underlying agreement; (2) the creditor must be oversecured; and (3) the fees must be reasonable.  
26 In re Le Marquis Assoc., 81 Bankr. 576 (Bankr. 9th Cir. 1987); In re Dalessio, 74 Bankr. 721  
(Bankr. 9th Cir. 1987).

27 A claim for attorneys' fees under § 506(b) is limited to holders of a consensual security  
28 agreement. In re D.W.G.K. Restaurants, Inc., 84 Bankr. 684, 686 (Bankr. S.D. Cal. 1988).

1 Although it is not necessary to refer to the legislative history for interpretation of § 506(b), the  
2 D.W.G.K. Restaurants court noted that the legislative history makes it perfectly clear that the  
3 agreement referred to in § 506(b) is a security agreement. D.W.G.K. Restaurants, 84 Bankr. at  
4 687.<sup>1</sup>

5 D.W.G.K. Restaurants is directly on point. In that case, there was an agreement between the  
6 parties providing for attorneys' fees, but the agreement did not give rise to a secured claim against  
7 the debtor. The moving creditor's secured claim arose from a non-consensual judgment lien. The  
8 court in D.W.G.K. Restaurants stated the policy underlying the requirement that the security  
9 interest be consensual:

10 When two parties contract, they are free to deal with one another as they please.  
11 Therefore, when a security interest is granted, the party granting the security  
12 interest is fully cognizant of both the value of the underlying obligation and the  
13 value of the security interest which is placed "at risk" in the event the parties fails to  
14 pay. On the other side of the transaction, the party receiving the security interest is  
15 free to demand security of sufficient value to cover any anticipated exposure  
16 caused by the other party's failure to perform on the underlying obligation. Section  
17 506(b) merely respects the party's contractual rights by allowing the secured party  
18 the full extent of his bargained for security.

19 The contractual provision allowing attorneys' fees must be bargained for and provided for in  
20 the underlying agreement for it to be enforceable under § 506(b). In re Charter Co., 63 Bankr.  
21 568, 571 (Bankr. M.D. Fla. 1986). There is no negotiated or bargained-for attorneys' fee  
22 provision in the case at bar.

23 R.C.W. 62A.9-203(1)(a) provides that a security interest may arise either by possession or  
24 by a written, signed agreement. Expeditors argues that it is the holder of a consensual, possessory  
25 security interest and that its invoices suffice as a security agreement under which its secured claim  
26 arose. Expeditors' claimed security interest arose either by possession under U.C.C. 9-305 or by a  
27 statutory carriers' lien under Cal. Civ. Code § 2144, but it did not arise pursuant to a consensual  
28 security agreement. The invoices do not constitute such an agreement. Expeditors' possession of  
the goods was not based on the invoices but was pursuant to the parties' arrangement for the

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<sup>1</sup> If the security agreement between the parties provides for attorneys' fees, it will be enforceable under Title 11,  
notwithstanding contrary law, and is recoverable from the collateral . . . . 124 Cong. Rec. H. 11095.

1 delivery of the debtor's goods. The arrangement in and of itself did not constitute a security  
2 agreement providing for attorneys' fees.

3 Alternatively, if the invoices were to provide a basis for a secured claim by Expeditors, the  
4 security agreement must be signed by the debtor to be enforceable. R.C.W. 62A.9-203(1)(a);  
5 Kreiger v. Hartig, 527 P.2d 483, 485 (Wash. Ct. App. 1974). In addition, a claimed security  
6 interest pursuant to the invoices was not perfected pursuant to U.C.C. § 9-401, and an  
7 unperfected security interest is avoidable in bankruptcy. 11 U.S.C. § 544.

### 8 9 CONCLUSION

10 For a party to claim attorneys' fees under the plain language of § 506(b), there must be a  
11 consensual agreement between the parties that both creates the security interest and provides for  
12 the payment of attorneys' fees. D.W.G.K. Restaurants, 84 Bankr. at 687. Although the parties'  
13 course of dealing and pattern of practice may arguably give rise to certain contractual obligations,  
14 they do not give rise to a security interest as contemplated in § 506(b). For the reasons stated,  
15 Expeditors' motion for reconsideration is denied. The debtor's countermotion for sanctions is also  
16 denied because there is no indication that Expeditors filed the motion for reconsideration in bad  
17 faith or for an improper purpose. B.R. 9011; In re Carraher, 971 F.2d 327, 328 (9th Cir.  
18 1992)(sanctions not warranted where issue previously undecided and has some logical appeal).

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20 DATED:

UNITED STATES BANKRUPTCY JUDGE